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DR NOOR AINI HJ SA'ARI

v.

SA-ART SAE-LEE & ANOR

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KN SEGARA JCA
ANANTHAM KASINATHER J
[CIVIL APPEAL NO: J-02-1093-2011]
C 27 JULY 2011

CIVIL PROCEDURE: *Discovery - Medical records - Consultant report pursuant to court proceedings - Substantial part of consultant report covered up - Whether report privileged - Whether parties bound by*
D *agreement to make discovery - Whether covered up part necessary for inclusion - Whether appellant estopped from refusing discovery*

The respondents filed a claim on negligence against the appellant for the failure of the appellant to take proper care of the first
E respondent during her period of pregnancy causing her to lose one of the twins before childbirth and birth of the second respondent in a deformed state. The appellant consequently sought the consent of the first respondent to conduct a physical examination of the second respondent resulting in the consultant
F report prepared by one Dr Malinee Thambyayah. The examination, for the purposes of assessing the second respondent's current condition and prognosis, was agreed upon on the condition that the appellant's solicitors undertake to furnish a copy of the report to the respondents' solicitors. Subsequently, the
G appellant's solicitor released the consultant report with substantial parts of the same covered up. The appellant claimed privilege and that the respondents were not entitled to have sight of the whole report because they only agreed to provide a report in relation to "the condition and prognosis of the second respondent". The
H respondents' application for the production of the consultant report in full by the appellant was allowed by the learned judicial commissioner ('JC') and hence this appeal by the appellant. It was the appellant's contention that the learned JC had erroneously applied the "what was the fair test" when the correct test was
I one of "necessity" under O. 24 r. 13(1) of the Rules of the High Court 1980 ('RHC'). It was also pointed out by the appellant

that the JC had failed to follow the long followed practice in the common law jurisdictions that parties are entitled to cover parts of the document that are privileged.

Held (dismissing the appeal with costs)
Per Anantham Kasinather J delivering the judgment of the court:

(1) A party to litigation can refuse discovery of a document in his possession by reason of irrelevance or privilege. However, as in the present case, discovery could not be refused when the parties had agreed to make discovery pursuant to an agreement. (para 7)

(2) As far as the consultant was concerned, the consultant report produced by her only dealt with the condition and prognosis of the second respondent. The appellant was obliged, pursuant to the agreement, to make discovery of the consultant report in its uncensored state, irrespective of the scope of O. 34 r. 7 of the RHC. Additionally, the appellant was estopped from refusing to make discovery since they had agreed to provide the consultant report subject to two conditions and both conditions had been complied with by the respondents. (paras 8 & 9)

(3) The law was concerned with substance and not form. Hence, it could not be right for the appellant to cover up parts of the consultant report which it expressly agreed would deal with the condition and prognosis of the second respondent. The appellant also could not cover up part of the consultant report on grounds of privilege. Meanwhile, even if the consultant report did deal with matters other than the condition and prognosis of the second respondent, that was probably because such matters were considered necessary for inclusion by the consultant when dealing with the condition and prognosis of the second respondent. And probably that was the reason why the consultant had gone out of her way to produce a report beyond her mandate. (para 18)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden-responden memfailkan tuntutan kecuaian terhadap perayu atas kegagalan perayu menjaga responden pertama dengan baik semasa tempoh kehamilannya yang menyebabkan kehilangan
B salah satu daripada anak kembarnya sebelum dilahirkan dan responden kedua dilahirkan cacat. Perayu dengan itu memohon kebenaran responden kedua untuk menjalankan pemeriksaan fizikal ke atas responden kedua yang menghasilkan laporan pakar yang disediakan oleh seorang yang bernama Dr Malinee Thambyayah.
C Pemeriksaan tersebut, bagi tujuan menilai keadaan dan prognosis semasa responden kedua, dipersetujui atas syarat bahawa peguamcara perayu mengakujanji memberikan satu salinan laporan tersebut kepada peguamcara responden-responden. Kemudian, peguamcara perayu mengeluarkan laporan pakar tersebut dengan
D sebahagian besar laporan tersebut disembunyikan. Perayu menuntut keistimewaan dan bahawa responden-responden tidak berhak untuk melihat keseluruhan laporan tersebut kerana mereka hanya bersetuju untuk memberikan laporan berkaitan dengan "condition and prognosis of the second respondent". Permohonan
E responden-responden untuk pengemukaan laporan pakar tersebut secara penuh oleh perayu dibenarkan oleh Pesuruhjaya Kehakiman ('PK') yang bijaksana dan dengan itu rayuan ini oleh perayu. Perayu berhujah bahawa PK yang bijaksana telah terkhilaf mengaplikasi "what was the fair test" apabila ujian yang betul
F adalah ujian "necessity" di bawah A. 24 k. 13(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Juga dinyatakan oleh perayu bahawa PK telah gagal mematuhi amalan yang lama dipatuhi di dalam bidang kuasa undang-undang common bahawa pihak-pihak berhak untuk menyembunyikan bahagian dokumen yang mempunyai
G keistimewaan.

Diputuskan (menolak rayuan dengan kos)
Oleh Anantham Kasinather H menyampaikan penghakiman mahkamah:

H **(1)** Sesuatu pihak kepada litigasi boleh menafikan penzahiran dokumen di dalam milikannya atas alasan ketidakrelevanan atau keistimewaan. Walau bagaimanapun, seperti di dalam kes ini, penzahiran tidak boleh dinafikan apabila pihak-pihak telah bersetuju untuk membuat penzahiran berikutan perjanjian.

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(2) Setakat yang berkaitan dengan pakar runding, laporan pakar yang dikeluarkannya hanya berkait dengan keadaan dan prognosis responden kedua. Perayu terikat menurut perjanjian tersebut, untuk membuat penzahiran laporan pakar tersebut dalam keadaan yang tidak ditapis, walau apa pun skop A. 34 k. 7 KMT. Tambahan, perayu diestop daripada menafikan penzahiran oleh sebab mereka telah bersetuju untuk memberikan laporan pakar tertakluk kepada dua syarat dan kedua-dua syarat tersebut telah dipatuhi oleh responden-responden.

(3) Undang-undang adalah berkaitan dengan isi dan bukan bentuk. Dengan itu, adalah tidak wajar bagi perayu menyembunyikan sebahagian laporan pakar yang dia bersetuju adalah berkait dengan keadaan dan prognosis responden kedua. Perayu juga tidak boleh menyembunyikan sebahagian laporan pakar tersebut atas alasan keistimewaan. Sementara itu, jika pun laporan pakar tersebut berkait dengan perkara selain daripada keadaan dan prognosis responden kedua, ia mungkin kerana perkara tersebut adalah dikira perlu untuk dimasukkan oleh pakar runding apabila menangani keadaan dan prognosis responden kedua. Dan mungkin itu adalah sebab mengapa pakar runding tersebut telah melampaui mandatnya dalam mengeluarkan laporan tersebut.

Case(s) referred to:

GE Capital Corporate Finance Group Ltd v. Bankers Trust Co and others [1995] 1 WLR 172 ***(foll)***

Great Atlantic Insurance Co v. Home Insurance Co and others [1981] 2 All ER 485 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 24 r. 13(1), O. 34 r. 7

For the appellant - Christopher Foo (Lye Ca-Ryn with him); M/s Raja, Darryl & Loh

For the respondents - R Jayabalan (N Jegatheesan with him); M/s John Ang & Jega

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-515-2009]

Reported by S Barathi

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JUDGMENT

Anantham Kasinather J:

Background Of The Case

B **[1]** This is an appeal from an order of the Learned Judicial Commissioner Dato' Hue Siew Kheng ('JC') refusing to allow the appellant to cover up on the ground of privilege parts of a document. The document in question is a report produced by a medical consultant Dr. Malinee Thambyayah, a Consultant C Pediatrician at the Pantai Medical Centre Kuala Lumpur ('The Consultant Report'). The appellant's claim privilege since the Consultant Report was prepared in respect of pending litigation between the parties.

D **[2]** The pending litigation concerns the alleged failure of the appellant to take proper care of the 1st respondent during her period of pregnancy. According to the respondents' pleaded case such failure on the part of the appellant caused her to lose one of the twins before childbirth and the birth of the 2nd respondent E in a deformed state.

[3] The facts giving rise to this appeal arose in this manner. Following the filing by the respondents of the claim against the appellant for negligence, the solicitors for the appellant sought the consent of the 1st respondent to conduct a physical examination F of the 2nd respondent resulting in the Consultant Report.

[4] According to the letter of 7 January 2009 from the appellant's solicitors to the respondent's solicitors, this examination was "for the purposes of assessing the 2nd plaintiff's current G condition and prognosis" (p. 129 of Jilid 2 Bahagian B & C). The solicitors for the respondents in response intimated their client's agreement to such examination conditional on *inter alia* the solicitors for the appellant undertaking to furnish them with a copy of the Consultant report. The solicitors for the appellant H agreed to the conditions imposed by the respondent's solicitors *vide* their letter of 3 February 2009 subject to the solicitors for the respondent making available to them any specialist report produced at their instance.

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[5] The evidence before the court is that following this agreement, Dr. Malinee conducted her examination of the respondents sometime on 2/3 March 2009 and produced the consultant report. The appellant for reasons which were not evident then but which are evident now delayed making available the consultant report to the respondents' solicitors until early 2010. The appellant's solicitor was clearly agonizing over whether to release the consultant report in full. Finally, the appellant's solicitor released the consultant report with substantial parts of the same covered up. The appellant's solicitor adopted the position that the respondents were not entitled to have sight of the whole report because they only agreed to provide a report in relation to "the condition and prognosis of the 2nd respondent". Alleging that the Consultant Report included matters which went beyond the condition and prognosis of the 2nd respondent, the appellant resisted the demand of the respondents' solicitors that they make discovery of the full report without any cover up. It is the submission of counsel for the appellant that the respondents' are only entitled to have sight of such parts of the Consultant Report which according to the index to the report relates to the condition and prognosis of the 2nd plaintiff. It is not in dispute that Dr. Malinee only produced one report following the examination of the respondents and this is the Consultant Report.

[6] The respondents then filed the summons in chambers for the production by the appellants of the Consultant Report in full. The learned JC agreed with the respondents and ordered the appellants to make available to the respondents the consultant report without any cover up. The appellants contended before us that the learned JC erroneously applied the 'what was the fair test' when the correct test is one of 'necessity' under O. 24 r. 13(1) of the RHC 1980. Counsel for the appellant also contended before us that the learned JC in Her Ladyship's judgment failed to follow the long followed practice in Common Law jurisdictions that parties are entitled to cover parts of the document that are privileged.

Decision Of The Court

[7] As regards the first issue, in our opinion, the issue of discovery is a non issue on the facts of this case. We take this position because generally a party to litigation can refuse discovery of a document in his possession by reason of irrelevance or

privilege. Neither can it be relied upon to refuse discovery when the party to the litigation agreed to make discovery pursuant to an agreement reached between the parties, as is the case here.

[8] In this case, the appellant agreed to provide discovery of the Consultant Report in consideration of the 1st respondent consenting to the 2nd respondent being examined by their nominated consultant. Admittedly, according to the contents of the appellant's letter of 7 January 2009, the purpose of the examination was to enable the consultant to produce a report on the condition and prognosis of the 2nd respondent. However, the fact of the matter is that, the consultant produced only one report following the examination of the 2nd respondent. In such circumstances, in our judgment, it is reasonable for the court to conclude that as far as the consultant was concerned, the consultant report produced by her only dealt with the condition and prognosis of the 2nd respondent. There is no affidavit from the consultant herself to suggest otherwise.

[9] Accordingly, in our opinion, irrespective of the scope of O. 34 r. 7 of the RHC, the appellant is obliged pursuant to the agreement concluded by it with the respondents to make discovery of the consultant report in its uncensored state. In our view, the appellant is, additionally, estopped from refusing to make discovery since they through their solicitors agreed to provide the consultant report subject to two conditions and both conditions have been complied with by the respondents.

[10] The second issue is whether the appellants can waive privilege over part of the consultant report and assert privilege over the remainder. We understand the submission of counsel for the appellant to be that this is an accepted practice in common law jurisdictions. In this respect, counsel submitted that to the extent Lord Templeman opined to the contrary in the case of *Great Atlantic Insurance Co v. Home Insurance Co and others* [1981] 2 All ER 485, His Lordship is wrong.

[11] Counsel referred us to the pronouncements of LJ Hoffmann in the case of *GE Capital Corporate Finance Group Ltd v. Bankers Trust Co. and others* [1995] 1 WLR 172, CA for this powerful submission. LJ Hoffmann made two significant pronouncements in the case of *GE Capital* on the subject of the entitlement of a party

to litigation to seal up or cover up parts of a document. The first principle of law enunciated by LJ Hoffmann dealt with the entitlement to cover up based on irrelevancy and the second on grounds of privilege.

[12] As regards the first principle of law, His Lordship said:

> It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant. *Bray's Digest of the Law of Discovery*, 2nd Ed (1910), pp. 55-56 puts the matter succinctly:
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> > Generally speaking, any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production; the party's oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are relevant, or to schedule the whole document and to seal up those parts which are sworn to be irrelevant …
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> (Paragraphs B to D at page 174)

[13] On the second principle of law, His Lordship said:

> The test for whether part can be withheld on grounds of privilege is simply whether that part is privileged. There is no additional requirement that the part must deal with an entirely different subject matter from the rest.
>
> (Paragraphs G to H at page 175)

[14] In the course of elucidating the aforesaid two principles of law, LJ Hoffmann distinguished the ratio in the case of *Great Atlantic* in the following manner:

> On its facts the *Great Atlantic* case was not about discovery at all. It concerned a privileged document of which counsel read out part in the course of his opening. It was held that, although he was unaware that the document was privileged, he thereby waived privilege in the whole. Templeman LJ said, at p. 536:
>
> > Severance would be possible if the memorandum dealt with entirely different subject matters or different incidents and could in effect be divided into two separate memoranda each dealing with a separate subject matter … Once it is decided that the memorandum deals with only one subject matter, it seems to me that it might be or appear dangerous or misleading to allow the Plaintiffs to disclose part of the memorandum and to assert privilege over the reminder.

[15] Lord Justice Hoffmann opined that the severance test set out above was only valid if it was confined to cases where a party had already caused to be admitted a privileged document in evidence. His Lordship opined that in all other cases, the test to determine whether a party could cover up part of the document invoking privilege after having waived privilege to the reminder is this:

> In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. The test for whether part can be withheld on grounds of privilege is simply whether that part is privilege. There is no additional requirement that the part must deal with an entirely different subject matter from the rest.
>
> (Paragraphs G to H at page 175)

[16] LJ Hoffmann then sought to definitively state the law concerning the rights of a party waiving privilege to part of a document as regards the remaining parts of the document in the following terms:

> I admire the ingenuity but games like this should not be necessary. I think that Saville J was right in *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd. (Note) No. 2)* [1992] 2 Lloyd's Rep. 540 when he held that disclosure of the unprivileged part of a document was not a waiver of privilege for the rest, even though both dealt with the same subject matter; likewise Gatehouse J in *British and Commonwealth Holdings v. Quadrex* (unreported), 4 July 1990.
>
> (Paragraphs F to G at page 176)

[17] We understand the submission of counsel for the appellant to be that a distinction ought to be drawn between discovery and admissibility. According to him, once this distinction is recognised it would be apparent that the ratio in *Great Atlantic* is not relevant to the facts of this case. The consultant report not having been admitted in evidence unlike in the case of *Great Atlantic*. For this reason, we were urged to follow the test propounded by LJ Hoffmann. According to learned counsel for the appellant, on an application of the test propounded by LJ Hoffmann to the facts of this case, the covered parts of the consultant report is clearly privileged notwithstanding that the consultant report concerns the same person and the subject matter of the whole report concerns this person and the waiver by the appellant of privilege to part of the consultant report.

[18] With respect, in our opinion, the outcome of this appeal is not to be determined by the application of either of the two different tests propounded in the cases of *Great Atlantic* and *GE Capital Corporate* but on the terms of the precise agreement reached between the parties as regards the disclosure of the consultant report. In our opinion, by the contents of the appellants' letter of 7 January 2009, the appellant undertook to make available the consultant report following the examination of the 2nd respondent on the understanding that the consultant report would relate to the condition and prognosis of the 2nd respondent. In other words, in consideration of the respondents making the 2nd respondent available for examination by their nominated consultant, the appellants agreed to waive the privilege that they would have otherwise enjoyed as regards the consultant report. In our judgment, if the appellants feared the risk of the consultant producing a report which exceeded their mandate to limit the report to the condition and prognosis of the 2nd respondent, they should have required the consultant to produce more than one report. Since the consultant report is the only report produced by the consultant following the examination of the 2nd respondent and since it is reasonable for us to assume that the mandate that was furnished to the consultant was to produce a report on the condition and prognosis of the 2nd respondent, it follows that the respondent is entitled to adopt the position that the consultant report only deals with the condition and prognosis of the 2nd respondent. As highlighted by the learned JC, there is nothing in the report to suggest that the covered parts do not relate to the condition and prognosis of the respondent only save on the basis of the index to the consultant report. With respect, to determine the contents of the consultant report based on its index is to give effect to form over substance, which is unacceptable on the facts of this case. First, the law is concerned with substance and not form. It cannot be right for the appellant to cover up parts of the consultant report which it expressly agreed would deal with the condition and prognosis of the 2nd respondent. The fact of the matter is that the appellants agreed to provide a report dealing with the condition and prognosis of the 2nd respondent and the consultant has produced only one report following the examination of the respondents dealing with the condition and prognosis of the 2nd respondent. It sounds ill in the mouth of the appellant to now refuse to hand

A over the full consultant report purportedly because unknown to them, the consultant had prepared the report dealing with matters other than the condition and prognosis of the 2nd respondent. Surely, it is for the consultant to assert to this effect and not for the appellant to say so. Accordingly, in the absence of a contrary
B assertion by the consultant who prepared the consultant report and there is none in this case, it is our considered view that the appellant cannot cover up part of the consultant report on grounds of privilege. Secondly, it is reasonable for us to infer that even if the consultant report did deal with matters other than the
C condition and prognosis of the 2nd respondent, this was probably because such matters were considered necessary for inclusion by the consultant when dealing with the condition and prognosis of the respondent. In other words, the consultant report dealing with condition and prognosis only would not make sense unless
D the report included the other matters incorporated therein. In our view, this probably explains why the consultant report takes the form it does. We cannot accept that a consultant employed by the appellants themselves would go out of her way to produce a report beyond her mandate unless she considered the report as a
E whole to be necessary for the court to understand the condition and prognosis of the 2nd respondent bearing in mind that the report was prepared when litigation was already pending.

Accordingly, we agree with the decision of the Judicial
F Commissioner. Appeal dismissed with costs. Appellant to pay costs of RM5,000 to the respondent. Deposit to the respondent towards account of fixed costs.

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